IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

MONDAY, THE 15TH OCTOBER 2007 / 23RD ASWINA 1929

RSA.No. 222 of 2006(B)

AS.3/2003 of MUNI-MAGI.COURT,THODUPUZHA
.....

: APPELLANT/RESPONDENT/DEFENDANT

SHAHABUDDIN, S/O.MOHAMMED HANEEFA,
RESIDING AT V.O.ESTATE, KALLAR-VATTIYAR P.O.,
PALLIVASAL VILLAGE, DEVIKULAM TALUK.

BY ADV. SRI.T.KRISHNAN UNNI

RESPONDENTS: PLAINTIFF

ANNAMMA MATHEW, W/O.M.K.MATHEW,
RESIDING AT WINDERMERE HOUSE, POTHENMEDU,
MUNNAR P.O., PALLIVASAL VILLAGE,
DEVIKULAM TALUK.

BY ADV. SRI.M.C.SEN (SR.)
SRI.SUJESH MENON V.B.
SRI.MATHEW JOHN (K)

THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD ON 15/10/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

M.SASIDHARAN NAMBIAR,J.

==========

R.S.A. NO. 222 OF 2006

==========

Dated this the 15th day of October, 2007

JUDGMENT

Defendant in O.S.No.204/2002 on the file of Munsiff Court, Thodupuzha is the appellant. Plaintiff in the suit is the respondent. The suit was originally instituted as O.S.89/1994 before the Munsiff Court, Devikulam, seeking a decree for declaration of her title to the plaint B schedule property and for recovery of possession of the same from the possession of the appellant after demolishing the shed therein and also for a permanent prohibitory injunction restraining appellant from trespassing into the remaining portion of plaint A schedule property. According to the respondent, plaint B schedule property is part of plaint A schedule property. Plaint A schedule property is 32 acres and 20 cents in old survey No.104 of Pallivasal Village. Originally plaint B schedule property was about 90 cents in

old survey No.104. Later after the Commissioner identified the property and submitted a plan with the help of Taluk Surveyor, extent of plaint B schedule property was amended as one half hector. As per the plaint allegations respondent is the absolute owner of the plaint A schedule property under the original of Ext.B6 sale deed dated 27.9.1968 and since then she has been in possession and enjoyment of the property. It was contended that as husband of the respondent was employed at Cochin Port Trust, she was staying with him at Kochi and after retirement they started residing 10 k.m. away from the plaint A schedule property. It was also alleged that appellant had a katcha shed on the road margin of Alwaye-Munnar road outside the plaint A schedule property at its southern eastern corner and while respondent and her husband were at Kochi, he dismantled the shed and put up the shed encroaching into the plaint A schedule property during March 1990 and the encroached area is the plaint B schedule property.

It was contended that when respondent and her husband warned appellant he agreed to vacate plaint B schedule property but did not do so. As it is learnt that appellant attempted to get a patta in respect of plaint B schedule property issued in his favour, suit was instituted seeking a decree for declaration of title and recovery possession, on the failure of appellant to surrender vacant possession inspite of a registered notice sent at the instance of the respondent.

2. Appellant in his written statement contended that respondent did not obtain 32.20 acres of land in old survey No.104 and old survey No.104 of pallivasal Village correspond to resurvey No.126 of block 13 and the extent is only 12.68 hectors and there are old survey stones on the southern boundary of the property and the southern boundary of old survey No.104 is not Alwaye-Munnar road as shown in the plaint schedule. It was also contended that plaint A schedule property and old survey No.104 in the sale deed are different and plaint A

schedule property is described in such a way as to include the property in the exclusive possession of the appellant also and about two acres of land immediately on the southern side of the property in old survey No.104 of Pallivasal Village, and on the northern side of Alwaye-Munnar road, is in his asbolute possession and enjoyment. Though in the original written statement it was contended that the southern boundary of the property owned and possessed by respondent in old survey No.104 of Pallivasal Village is determined by the survey stones and fencing and beyond the same is survey No.435 part and a strip property was given R.S. No.225 part of block 11 in the resurvey conducted in 1977 and National Highway goes through the property in survey No.435 part and a strip of land having approximate extent of two acres in between the road and the southern boundary of the property in old survey No.104 has been in the asbolute and uninterrupted possession of Paily, the predecessor in interest of the appellant, eversince 1950 and he

constructed a building therein and the building was assessed and numbered by the Pallivasal Panchayat. Written statement was subsequently amended, after the plaint was amended in accordance with the report submitted by the Commissioner. By that amendment paragraph No.3 of the original written statement was substituted by a new paragraph wherein appellant contended that though respondent obtained 32.20 acres under Ext.B6 sale deed, she never obtained possession of the entire property and the south eastern portion of the said property was rocky area with trees and shrubs grown, when it was encroached upon along with the tharisu land on the northern side of Alwaye-Munnar road by Paily in 1950. It was also contended that Paily cleared the encroached area and cultivated with coffee, pepper vines and areca trees and has been residing therein after constructing a building along with his family and portion of the land encroached in old survey No.104 of Pallivasal village is having an extent of 1.24 acres

equivalent to one half hectare and the tharisu land under the possession of Paily had an extent of approximately 70 cents and the western portion of that was fully rocky and the land thus possessed by Paily was slopping towards the south from the crest of a hill and the building constructed by Paily was assessed by the Pallivasal Panchayat since 1953 and Tahsildar of Devikulam Taluk initiated proceedings under Land Conservancy Act against Paily in respect of 40 cents of tharisu land under proceedings in L.C.139/1954 treating it as comprised in survey No.53/1. It was further contended that possession of Paily over that property was open, public, continuous and against the right and interest of the respondent and her predecessor in interest and Paily put up fencing on the northern, western and southern boundaries of the property and in 1977 the properties in the possession of the respondent and appellant were surveyed and boundaries fixed and the entire property in the possession of Paily was included in

R.S.No.225 of Block 11 and the northern property belonging to respondent was surveyed and assigned field No.126 in block No.13 and the common boundaries of the two blocks were fixed according to the possession along the northern boundary of the property possessed by Paily. It was also contended that northern boundary of his property went along the crest of a hill, which is the natural boundary, and Paily sold that property to the appellant as per Ext.B1 agreement dated 21.7.1990 for consideration and thus appellant and his predecessor has been in posseesion of 1.24 acres and the adjacent tharisu land on the northern side of the land eversince 1950 and even if appellant has any title to the property it is lost by adverse possession. Appellant also raised a counter claim seeking a decree for declaration of his title to the plaint B schedule property by adverse possession contending that during the resurvey conducted in 1977 the plaint B schedule property which is shown as the counter claim plaint

B schedule property. The remaining property in the possession of appellant was shown as the counterclaim A schedule property. It was contended that properties were surveyed after publication of notice under section 9(2) of Resurvey and Boundaries Act and then boundaries fixed and plaint B schedule property was marked in survey plan as R.S.No.225 of block 11 and therefore respondent is not entitled to the decree sought for. Apart from the declartion of title, appellant also sought a decree for permanent prohibitory injunction restraining respondent from trespassing into counter claim A schedule property.

3. Learned Munsiff appointed PW1 as Advocate Commissioner. He submitted Ext.C1 report and C2 plan. Thereafter PW3 was appointed as Commissioner and he submitted Ext.C3 report and C4 plan. The husband of the respondent was examined as PW2. At that stage, as per the orders of District Judge, suit was transferred from Munsiff Court, Devikulam to Munsiff Court, idukki. When suit was pending

before Munsiff Court, Idukki, the plaint and written statements were amended. PW7 Advocate Commissioner was appointed, on the application filed by appellant. He submitted Ext.C7 report and C7(a) and (b) plans. PW4 was also appointed as Commissioner to prepare a plan with the assistance of Taluk Surveyor. PW4 along with the Taluk Surveyor inspected the property and prepared Ext.C6 plan and C5 report. While the case was pending before Munsiff Court, Idukki, on a transfer application filed by respondent, as per order in O.P.TR 56/1999, learned District Judge transferred the case back to Munsiff Court, Devikulam, as the transfer was agreed to by appellant also. Thereafter Pws.5 to 9 , Dws.1 to 6, CW1 were examined and Exts.A1 to A19, B1 to B6 and C1 to C8 were marked. Learned Munsiff on the evidence found that respondent did not establish his title to the plaint B schedule property and therefore she is not entitled to the decree for declaration or recovery of possession sought for. The suit was dismissed.

In the counter claim learned Munsiff found that appellant established his title and possession to the plaint A and B schedule property and a decree declaring title of the appellant to the plaint B schedule property and a permanent prohibitory injunction restraining respondent from trespassing into counterclaim A schedule property were granted. Respondent challenged the decree and judgment before Sub Court, Thodupuzha in A.S.3/2003. Learned Sub Judge on reappreciation of evidence found that under Ext.B6 sale deed respondent has title to the plaint A schedule property. Learned Sub Judge also found that plaint B schedule property is part of plaint A schedule property and respondent has title to plaint B schedule property. Learned Sub Judge also found that appellant did not establish his title to plaint B schedule property which is the counterclaim B schedule property and therefore he is not entitled to the decree granted in the counterclaim. The appeal was allowed and a decree declaring title of

respondent to plaint B schedule property as marked by the Commissioner in Ext.C6 plan was granted. Appellant was directed to surrender vacant possession of plaint B schedule property after demolishing the shed. He was also restrained by a permanent prohibitory injunction from trespassing into the remaining portion of plaint A schedule property. The judgment is challenged in this appeal.

4. The argument of learned counsel appearing for appellant was that first appellate court did not properly consider the evidence in the light of admitted facts. It was argued that under Ext.B6 sale deed, respondent obtained 32.20 acres in survey No.104 of Pallivasal Village and it is shown as the plaint A schedule property and plaint B schedule property as originally stood was only about 90 cents which after the amendment is one half hector. It was argued that when the extent in acre is converted into hectors 32.20 acres could only be 13.03 hectors and after the resurvey,

old survey No.104 was changed to R.S.No.126 and Ext.A16 the field map of R.S.No.126 shows that total extent in that R.S.No. 126 is only 12.68 hectors and therefore by the resurvey difference in extent is only 0.35 hectors equivalent to 85 cents and plaint B schedule property is one half hector and it cannot be part of old survey No.104 and relying on Ext.A18 order whereunder part of R.S.No.225 was separated as 225/2, was added to R.S.No.126 as part of old survey No.104, and so respondent cannot claim title to the entire one half hector in R.S.225/2 and therefore finding of the first appellate court that respondent has title to plaint B schedule property is unsustainable. It was also argued that even if the subsequent modification in the resurvey, evidenced by Exts.A17 and A18 were accepted, it will not establish the title of respondent to the entire plaint B schedule property and therefore the decree granted cannot stand. Learned counsel also argued that though a portion of R.S.No.225 was

separated as R.S.225/2 under Exts.A17 and A18, they are not binding on the appellant as no notice was issued to the appellant before passing the orders and first appellate court should not have relied on Ext.C6 plan to uphold the title of respondent to the plaint B schedule property. It was further argued that courts below should have found that property was not correctly demarcated in Ext.C6 plan, as the Commissioner has only shown the resurvey plot in Ext.C6 plan, after preparing the plan in accordance with the old survey number and at the outset, when the total extent including plaint B schedule property exceeds the total extent covered under Ext.B6, the identification made by the Commissioner to prepare Ext.C6 plan can never be accepted and on the basis of that identification no decree could be granted and therefore the decree granted by the first appellate court is to be set aside. Learned counsel also argued that eventhough Ext.B1 agreement is an unregistered agreement, it can be used as parol

evidence to prove possession of the predecessor in interest of appellant and Ext.A1, with Ext.B2 notice issued to Paily the predecessor in interest of the appellant in 1955 establish that from 1955 onwards Paily and thereafter appellant has been in possession of plaint B schedule property and therefore even if respondent has title to the property it is lost by adverse possession and limitation. Learned counsel argued that in any case the case has to be remanded to the trial court for fresh disposal, after proper identification of the properties.

5. Learned senior counsel appearing for respondent argued that after the Commissioner submitted Ext.C5 report and C6 plan, which establish that plaint B schedule property being part of plaint A schedule property as part of old survey No.104, in accordance with the report and plan plaint was amended and appellant did not file any objection to the report complaining about the identification. It was pointed out that after

the amendment of the plaint, accepting the identification and the correctness of the report and plan, appellant himself amended the written statement accepting the identification made by the Commissioner and admitting that the disputed property was originally in old survey No.104 and after resurvey it is R.S.225/2 as shown in Ext.A17 field map and in such circumstance, appellant is not entitled to dispute the identity. Learned senior counsel also argued that Exts.A17 and A18 establish that at the time of resurvey, mistake was committed by the survey authorities in fixing the old survey No.104 and under Ext.A18 order a portion of R.S.No.225, which was separated as R.S.225/2, was also found to be part of old survey No.104 and therefore finding of first appellate court that appellant has title to the plaint B schedule property, being part of plaint A schedule property, is perfectly correct. Learned counsel also argued that when appellant is not even admitting the title of respondent to the

plaint B schedule property, he cannot claim adverse possession as against the respondent and first appellate court rightly rejected the claim for title raised by the appellant. Learned counsel argued that on the facts and circumstances of the case, no substantial question of law is involved in the appeal and it is only to be dismissed.

6. The title of respondent to the property covered under Ext.B6 assignment deed was not disputed. In fact a reading of the written statement establish that title of the respondent to the property covered under Ext.B6 is not only not disputed but is admitted and what was contended by the appellant was only that respondent did not obtain possession of the entire property covered under Ext.B6 sale deed. Ext.B6 establish that as per the said registered sale deed the previous title holder assigned several properties in favour of the respondent, including plaint A schedule property. The description of plaint A schedule property, as seen in Ext.B6 shows that the property

is in Pallivasal Village of Devikulam Taluk of Kottayam District and comprised in old survey No.104 and patta number 20 and extent is 32.20 acres corresponding to 12.880 hectors. The boundaries shown are east survey field No.435, south survey field No.436, west and south survey field No.53,574 and 575 north survey field No.435. It also shows that the property so transferred is cardamom plantation, cardamom crops, coffee plants, coffee crops and all other trees and plants and all other improvements contained therein with the buildings and constructions, store room and originally comprised part of Harold Manibar estate and then called Ranga Vila Estate. Therefore it is clear that the properties so obtained under Ext.B6 is the property comprised in old survey No.104 of Pallivasal Village surrounded by land in survey No. 435 on the east, land in survey No. 436 on the south, land in survey No.53,574 and 575 on the west and land in survey No.435 on the north. Therefore the title obtained by the respondent under Ext.A1

is that of the entire property comprised in old survey No.104.

7. It is not disputed that subsequently there was a resurvey which was finalised in 1977. At the time of resurvey old survey No.104 is changed to R.S.No.126. When the total extent in old survey No.104 was 12.880 hectors corresponding to 32.20 acres, as seen from Ext.A16 field map, the total extent of R.S.No.126 is only 12.68 hectors. Hence there is a deficit of 0.35 hectors corresponding to 85 cents. It is for that reason respondent filed a complaint before the Superintendent of Resurvey stating that when as per the original survey records the extent available in old survey No.104 was 32.20 acres and as per the resurvey plan there is a shortgage and therefore the mistake is to be corrected. Under Ext.A18 order, when the properties were resurveyed it was found that respondent had 32.20 acres in old survey No.104 but under R.S. No.126 the extent is less and it was due to the mistake in demarcating R.S.No.225. Hence as

per resurvey measurements 0.500 hectors was separated and sub divided as R.S.225/2 and the remaining extent in R.S.225 was sub-divided as R.S.No.225/1. It was found that R.S.225/2 form part of old survey No.104 and is the property respondent. But in view of the pendency of the suit, it was made clear under Ext.A18 order that the records are to be corrected only after disposal of the suit. It is on the basis of this correction in the resurvey, the Commissioner in Ext.C6 plan had demarcated plaint B schedule property as part of plaint A schedule property comprising in old survey No.104. The argument of learned counsel appearing for appellant is that Ext.A18 order was passed without notice to the appellant and as Ext.C6 plan was prepared on the basis of Ext.A18 order, it cannot be accepted. It was also argued that the demarcation of R.S.225/2 as part of old survey No.104 cannot be true because the total extent available under R.S.No.104 is only 12.880 and the extent in R.S.No.126 is 12.68 hectors and

if 0.50 hectors is also to be added, it would be more than the extent, which was originally available in old survey No.104 and therefore on the basis of resurvey effected under Ext.A18 the identity or the title cannot be fixed. Learned counsel also argued that even if it is taken that appellant did not objected to the correctness of Ext.C6 plan prepared by the Commissioner and amended the written statement and the counter claim accepting Ext.C6 plan, that admission will not give title to the respondent and on that basis title of respondent cannot be upheld. Learned counsel also argued that any admission can be explained and when it is proved by arithemetic that the extent available in old survey No.104 and the total extent in R.S.126 and R.S.No.225/2 exceed the same, respondent is not entitled to a decree for declartion or recovery of possession without properly identifying the property and therefore findings of the first appellate court is unsustainable.

8. It is true that unless there is a pre existing title, an admission by the defendant regarding title of the plaintiff by itself will not enable the plaintiff to get a declaration of title. But that is not the question herein. The title of respondent to the property covered under Ext.B6 sale deed was not disputed and cannot be disputed in the light of the contentions raised. Therefore it is not the admission regarding the title that is relevant. Admission is with regard to the identity of the disputed property. What was argued by learned counsel appearing for appellant is on the correctness of the identity of plaint B schedule property, as the property covered under Ext.B6 sale deed. The question on the identity of the property is definitely a question of fact. When the Commissioner identified the property and prepared Ext.C5 report and Ext.C6 plan demarcating the property, appellant did not file any objection disputing the correctness of the identity. Moreover accepting

the correctness of the identity he amended his written statement and also raised counterclaim based on that identity. The question is whether such an appellant is entitled to dispute the identity of the plaint B schedule property at the second appellate stage. The only possible answer is a big negative. When appellant himself admitted the identity and the demarcation of the property in Ext.C6 plan and amended the written statement and also claimed decree for declaration of his title by adverse possession in respect of that property, it is futile for the appellant at the second appellate stage to contend that identification in Ext.C6 plan is not correct. As stated earlier, the original extent of plaint B schedule property shown was about 90 cents in old survey No.104. After submission of Ext.C6 plan and C5 report the extent of plaint B schedule property was amended as one half hector, in accordance with Ext.C6 plan, which in fact is in accordance with Ext.A18 order and Ext.A17 plan, where the extent of R.S.No.225/2

being the property originally covered under old survey No.104 was shown as one half hector. It is thereafter appellant amended the written statement. The two acres alleged in his possession was shown as counterclaim A schedule property and the plaint B schedule property claimed by respondent as part of plaint A schedule property was shown as counter claim B schedule property. It is not in dispute that counterclaim B schedule property is the same plaint B schedule property. The counterclaim B schedule property is described as follows:-

> Old survey No.104. Resurvey No.225/2. Extent 1.24 acres equivalent to 0.50 hectares. Boundaries east south and west A schedule propety. North property of plaintiff in old survey No.104 and resurvey No.126 in block 13. The property described as 1.24 acres 0.50 hectares of land in

resurvey 225/2 and old survey 104 comprised within the above boundaries with building 4/5 and improvements therein."

In the light of the said description of the disputed property in the written statement, appellant cannot be heard to contend that plaint B schedule property which is one half hector of land in R.S.225/2 was not part of the property in old survey No.104. In such circumstance, the factual finding of first appellate court that the disputed plaint B schedule property having an extent of one half hector in R.S.225/2 of Pallivasal village was originally part of old survey No.104 of Pallivasal village, cannot be challenged in the second appeal. Eventhough learned counsel appearing for appellant argued that the extent of R.S. No.126 and R.S. No.225/2 together exceeds the original extent available in old survey No.104 and therefore the entire disputed property cannot be part of old survey No.104 in the light of the case

pleaded by appellant that counterclaim B schedule property is in R.S.No.225/2 and it was part of old survey No. 104 of Pallivasal village, the argument cannot be accepted. Dispute in the case is only whether the disputed 0.50 hector form part of old Sy.No.104 and not on the total extent in old survey No.104. Even if the whole property in old survey No.104 was not correctly demarcated, when it was admitted that the disputed property forms part of old survey No.104 the correctness of the whole plot in old survey No.104 is not very relevant. In any event it is not a substantive question of law involved in this appeal. If that be so, it can only be found that the disputed plaint B schedule property is part of old survey No.104 of Pallivassal Village.

9. Though learned counsel appearing for appellant vehemently argued that Ext.A18 order passed by the survey authorities, while the dispute was pending before the civil court was without notice to appellant and therefore not binding on

him, as rightly pointed out by learned senior counsel when examined as DW1, appellant himself admitted that he had shown his records after getting notice on the resurvey conducted.That evidence corroborates the evidence of PW6, who was then the Resurvey Superintendent. Evidence of PW6 shows that after getting a complaint from respondent that there was mistake in the resurvey as the entire extent in old survey No..104 of Pallivasal Village was not included in R.S.No.126, he had issued notice to all the interested parties and thereafter the original of Ext.A18 order was passed and Ext.A18 order was passed only after issuing notice to the appellant. PW6 also deposed that Ext.A18 order was passed after hearing the appellant. In such circumstance, it is futile for the appellant to contend that Ext.A18 order was passed without notice to him or is not binding on him. In any event, in view of the specific case pleaded in the written statement and the counterclaim, appellant cannot be heard to contend

that R.S.No.225/2 was not part of old survey 104. When Ext.B6 proves title of respondent to the entire property in old survey No.104 and appellant himself in the written statement admitted that the respondent obtained the properties covered under Ext.B6 and the contention in the written statementwas only that the entire property covered under Ext.B6 was not obtained. But in the light of Ext.B6, as rightly found by first appellate court, it can only be found that respondent has title to the entire property in old survey No.104. As it is proved that the disputed B schedule property is part of old survey No.104, finding of the first appellate court that respondent has title to plaint B schedule property is perfectly correct.

10. Then the only question is whether title of the respondent has been lost by adverse possession and limitation. When the title of respondent is admitted or proved, it is for the appellant to establish that it was lost by adverse

possession and limitation. It is more so, when appellant sought a decree for declaration of his title perfected by adverse possession, in respect of the very same property, over which respondent sought a decree for declaration of title and recovery possession. What was contended by appellant was that plaint B schedule property was originally in the possession of Paily and he purchased the property under Ext.B1 agreement and since 1950 Paily and after Ext.B1 appellant has been in possession of that property and that possession was adverse to the respondent and therefore appellant has perfected his title. Learned counsel appearing for appellant argued that claim for adverse possession was not properly considered by first appellate court and therefore that question has to be decided on the evidence. Reliance was placed on the decision of the Apex Court in **P.T.Munichikkanna Reddy and others v. Revamma and others (2007) 6 SCC 59) and** argued that

evidence establish that appellant and his predecessors have been in peaceful open and continuous possession of the property to the knowledge of the whole world, including the respondent from 1950 onwards and therefore the title of the respondent has been barred by adverse possession and limitation. It was also argued that as declared by the Apex Court, Ext.B2 notice issued by the Tahsildar establish that in 1955 itself Paily, the predecessor in interest of the appellant, was in possession of the property and he continued the possession and under Ext.B1 that possession was transferred to appellant and appellant continued his possession in continuation of the possession of Paily and therefore that possession could only be adverse to the respondent. Learned counsel also argued that case of appellant cannot be rejected on the basis of the mistake in the survey number as he was under the belief that it is the property of the Government and if the property forms part of the property of

respondent, then title of the respondent is also barred by adverse possession.

11. Learned senior counsel appearing for respondent argued that Ext.B1 is a concocted document and it cannot be relied on and Ext.B2 notice is not in respect of the disputed property and it is in respect of the Government land, which lies further to the west of old survey No..104 and in such circumstance, appellant cannot claim any title to the plaint B schedule property by adverse possession. Relying on the decision of the Apex Court in **T.Anjanappa and others v. Somalingappa and another (2006) 7 SCC 570)** it was aruged that when appellant is not sure as to who is the true owner and even disputed the title of respondent, he cannot raise a claim that his possession was hostile to the respondent and therefore on that sole ground plea of adverse possession is to be rejected. It was also argued that when appellant disputes the title, he is not entitled to claim

title perfected by adverse possession as against the respondent as a plea of adverse possession would lie only after recognising the right of respondent. It was therefore argued that the plea of adverse possession was rightly rejected by the first appellate court.

12. The concept of adverse possession contemplates a hostile possession, a possession which is expressly or impliedly in denial of the right and title of the true owner. Possession to be adverse must be possession by a person who has knowledge about the title of the other against whom adverse possession is claimed but does not acknowledge the title and denies it. Adverse possession is commenced in wrong and is aimed against the real owner. A person is said to hold the property adversely to the real owner, when that person in denial of the owners right extended the true owner from the enjoyment of the property. Apex Court in **Annasaheb Bapusaheb Patil v. Balwant**

(AIR 1995 SC 895) held the legal position as follows:-

> "Adverse possession is that form of possession or occupancy of land which is inconsistent with the title of the rightful owner and tends to extinguish that persons title. Possession is not held to be adverse if it can be referred to a lawful title. The person setting up the adverse possession may have been holding under the rightful owners title e.g.trustees, guardians, bailiffs or agents. Such persons cannot set up adverse possession."

13. It is well settled that mere possession, however long, does not necessarily mean that it is adverse to the true owner. Adverse possession really means hostile possession which is expressly or impliedly in denial of title of the true owner and in order to constitute adverse possession such possession must be adequate in continuity, in publicity and in extent so as to show that it is adverse to the true owner. The classical requirements of adverse possession are peaceful, open and continous possession. That possession must be open and hostile enough to be capable of being known by the parties interested in the property. Though it is not necessary that there should be evidence of the person claiming adverse possession actually informing the real owner of the former's hostile action.

14. Apex Court in 'Anjanappa's case (2006(7) SCC 570 (supra) considered the question whether a person could claim adverse possession without recognising the title of the true owner.

Analysing the case law it was held:-

> "The High Court has erred in holding that even if the defendants claim adverse possession, they do not have to prove who is the true owner and even if they had believed that the Government was the true owner and not the plaintiffs, the same was inconsequential. Obviously the requirements of proving adverse possession have not been established. If the defendants are not sure who is the owner, the question of their being in hostile possession and the question of denying title of the true owner do not arise ."

Learned counsel appearing for appellant relied on the following observations of the Apex Court in Munichikkanna Reddy's case (supra) to press the plea of adverse possession. It reads:-

> "Modern statutes of limitation operate, as a rule, not only to cut off one's right to bring an action for the recovery of property that has been the adverse possession of another for a specified time, but also to vest the possessor with title. The intention of such statutes is not to punish one who neglects to assert rights, but to protect those who have maintained the possession of property for the time specified by the

statute under claim of
right or colour of title."

The argument of learned counsel is that while considering the plea of adverse possession, it is to be appreciated not as a premium to the wrong doer who trespassed and reduced the property of another to his unlawful possession, but as a punishment to the true owner who deserted his property, when the wrong doer has improved the property. It was argued that when the predecessor of the appellant was served with a notice alleging that he is a trespassor of the Government land and he continued in possession of the property as a trespassor and subsequently that possession was transferred to the appellant who continued in possession of the property as its true owner, such possession could only be adverse to the true owner, even if the true owner is the respondent and therefore title of the respondent was lost by adverse possession. The following observations of the Apex Court in (**S.M.Karim v. Bibi Sakina (AIR**

1964 SC 1254) is relevant to decide the dispute.

> "Adverse possession must be adequate in continuity, in publicity and extent and a plea is required at the least to show when possession becomes adverse so that the starting point of limitation against the party affected can be found."

Apex Court in **Saroop Singh v. Banto and others (2005) 8 SCC 330)** held:-

> "29. In terms of Article 65 the starting point of limitation does not commence from the date when the right of ownership arises to the plaintiff but commences from the date the defendant's possession becomes adverse

(See Vasantiben Prahladji Nayak v.Somnath Muljibhai Nayak).

30. "Animus possidendi" is one of the ingredients of adverse possession. Unless the person possessing the land has a requisite animus the period for prescription does not commence. As in the instant case, the appellant categorically states that his possession is not adverse as that of true owner, the logical corollary is that he did not have the requisite animus. (See Mohd.Mohd. Ali v. Jagadish Kalita, SCC para 21)".

Appellant can succeed in the plea of adverse possession only if he proves his possession and

that his predecessors in interest for the requisite period and that too as against the respondent recognising that respondent is the true owner.

15. As rightly pointed out by learned senior counsel what was contended by appellant himself was that he has been in possession of the disputed property as it is a Government land and that too in continuation of the possession of the original trespassor Paily. There was no case that Paily was possessing the property, with the knowledge that it is the property of respondent or that of the predecessor in interest of the respondent. Appellant also has no case that after he obtained possession of the property in 1990, he has been in possession of the property with the knowledge that it is the property belonging to the respondent. In such circumstance, on that very ground the plea of adverse possession has to fail. Moreover, according to the appellant, adverse possession started after the trespass originally made by Paily

and realiance was placed on Ext.B2 to prove that Paily has been in continuous open possession from the date of Ext.B2. Ext.B2 is a notice issued by Tahsildar, Devikulam on 10.8.1995 to Paily under whom appellant claims title and possession to the property. It was a notice directing Paily to appear and show cause notice why he has trespassed into the Government poramboke land. That property is in survey No.53/1 of Pallivasal Village having an extent of 40 cents. Ext.C6 plan as well as Ext.A16 and A17 establish that survey No.53 is not to the south of old survey No.104 but to its west. It is not disputed. The disputed property is admittedly nowhere near survey No.53/1 of Pallivasal village, which is a Government poramboke land. Therefore Ext.B2 notice could not have been with respect to the disputed plaint B schedule property, as survey No.53 which is the poramboke land is further to the west of old survey No.104. In such circumstance, Ext.B2 will not help appellant to claim that Paily has been in

possession of the disputed property.

16. Though learned counsel appearing for appellant relying on Ext.B1, which contains a recital to the effect that Paily has been in possession of the property from 1950 onwards and that too adverse to the true owner it cannot be relied on. As rightly pointed out by learned senior counsel, no reliance could be placed on Ext.B1 as very reading of Ext.B1 establishes that it was created for the purpose of claiming a right by adverse possession. Even if Ext.B1 is relied, it would only show that Paily was in possession of the property as a Government land and that possession cannot be adverse to the respondent the true owner. As the burden to prove that respondent lost the title by adverse possession and appellant perfected his title by adverse possession is on the appellant, he can succeed only on establishing that he or Paily has been in possession of the property adverse to the respondent. Paily was not examined. Evidence of appellant is insufficient to prove that

Paily has been in possession of the disputed property and that too in denial of the title of respondent or her predecessor. Therefore even if it is taken that appellant or his predecessor has been in possession of the property covered under Ext.B2,it will not establish an adverse possession. Evidence on record do not establish that appellant or his predecessor have been in possession of the disputed property for the requisite period with the animus to possess as against respondent, the true owner. In such circumstance, there is no merit in the appeal. No substantial question of law is also involved in view of the settled legal position stated earlier.

The appeal is therefore dismissed.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

R.S.A.NO.222 /06

JUDGMENT

OCTOBER,2007